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90-1873

NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

J. GORDON BINGHAM, ET AL.;

AND

FIRST CENTRAL CREDIT UNION,
J. GORDON BINGHAM, ET AL.,

PETITIONERS,

V.

NATIONAL CREDIT UNION ADMINISTRATION BOARD,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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57

QUESTIONS PRESENTED FOR REVIEW

Simultaneously, the National Credit Union Administration Board (NCUAB), an agency of the United States, filed two cases against Petitioners, including the federally-insured, state-chartered First Central Credit Union of Memphis, Tennessee. The first case was a Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order. The second case was an Order of Conservatorship. A Petition to Show Cause in each case was filed against NCUAB in the U.S. District Court in Memphis. The principal questions are:

1. Whether the Court of Appeals erred by sustaining the dismissal and mootness of the Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order?

2. Whether the Court of Appeals erred by sustaining the Order of Conservatorship?

3. Whether the Petitioners' rights to due process of law under the Fifth and Fourteenth Amendments to the Federal Constitution were violated?

PARTIES TO THE PROCEEDINGS

This petition involves two cases which were consolidated in the Court of Appeals for the Sixth Circuit by that Court's own motion. The style is the same as used in the opinion of the Court of Appeals; all parties below are parties here. Petitioners are J. Gordon Bingham, Jr., his wife, Brenda H. Bingham, managers of the First Central Credit Union of Memphis TN (Credit Union), who did business as First Central Data Services, First Central Financial Services and Employee Insurance Consultants; the Credit Union also is a petitioner.

Respondent is the National Credit Union Administration Board (NCUA or NCUAB), Washington, D.C., an agency of the United States.

No parent or subsidiary companies are required to be listed under Rule 29.1. The petitioners filed a Disclosure of Corporate Affiliations and Financial Interest in the Court of Appeals.

Petitioners were represented in the

United States District Court at Memphis as well as in the Court of Appeals by their present attorney, Albert H. Boyd.

Respondent was represented in the District Court by Mrs. Mary Rupp, Staff Attorney, NCUA, Washington, D.C., and Mr. Joe Dycus, Assistant U.S. Attorney, Memphis. Mrs. Rupp was on NCUA's brief in the Court of Appeals but oral argument was made there by Mr. John K. Ianno, Staff Attorney, NCUA, Washington.

TABLE OF CONTENTS
AND
TABLE OF AUTHORITIES

Table of Contents

Page

(a) Questions for review i

(b) Listing of parties; parent companies and subsidiaries per Rule 29.1 .. ii

(c) Table of Contents iv
Table of Authorities iv

(d) Reference to opinion of Court of Appeals for Sixth Circuit 1

(e) Jurisdictional grounds 1

(f) Constitutional provisions, statutes and other regulations 1

(g) Statement of the Case 2
Pleadings 2
Testimony 15

(h) Argument 31
Dismissal and Mootness 32
Conservatorship 41

(i) Certificate of Service 50

(k) Appendix (separate volume)

Table of Authorities

Page

Alliance Federal Savings and Loan v. Federal Home Loan Bank Board, 782 F.2d 490 (5th Cir. 1986) 44

Biscayne Federal Savings and Loan v. FHLBB, 720 F.2d 1499 (11th Cir. 1983), cert. den. 467 U.S. 1215 (1984) 44, 46, 47

International Union v. Dana Corp., 697 F.2d 718 (6th Cir. 1983 en banc) 33, 36

REFERENCE TO REPORTS OF OPINIONS BY OTHER COURTS

The opinion of the Court of Appeals for the Sixth Circuit is being published; a copy is included in the separate Appendix.

JURISDICTIONAL GROUNDS

The date of entry of the judgment sought to be reviewed is March 6, 1991. The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

	Page
5 U.S.C. Sec. 706 (Appendix p. 53)	35,37,38,41
12 U.S.C. Sec. 1464(d)(6)(A) (Appendix p. 59)	45,46
12 U.S.C. Sec. 1751 et seq.	9,11
12 U.S.C. Sec. 1786(e)(1) (Appendix p. 61)	8,14, 39,41,45
12 U.S.C. Sec. 1786(e)(2) (Appendix p. 61)	2,10, 38,39
12 U.S.C. Sec. 1786(f)(1) (Appendix p. 64)	2,8,10 14,38,39
12 U.S.C. Sec. 1786(f)(2)	9
12 U.S.C. Sec. 1786(h)(1) (Appendix p. 66)	13,41

12 U.S.C. Sec. 1787(c)(1)(A)(B)(C)... 48
(Appendix p. 68)

12 C.F.R. Part 747.01 et seq. 9,38
NCUA Rules and Regulations
(Appendix p. 51)

Rule 41, Rules of Civil Procedure,
Dismissal of Actions 34,37
(Appendix p. 55)

Black's Law Dictionary,
Definition of "and" and "or" 40
(Appendix p. 57)

Financial Institutions, Reform and
Recovery Act of August 9, 1989
Title 4, Sec. 401(a)(2) 45
(U.S. Code and Cong. News,
Vol. 1, 101st Cong., 1st
Sess. 1989, 103 Stat. 354)
Title 12, Sec. 1217 7,43

STATEMENT OF THE CASE

Notice of Filing of Notice of Dismissal of Temporary Cease and Desist Order and Notice of Charges and Hearing. Just before 5 p.m., January 16, 1990, the day before the scheduled hearing in District Court, NCUAB's attorney filed this Notice of Dismissal in the District Court pursuant to 12 U.S.C. Sections 1786-(e)(2) and (f)(1). The dismissal was unilateral:

> The Board has determined that based on present conditions, the Cease and Desist Orders are no longer necessary.

At the start of the hearing at 5:15 p.m., January 17, 1990, NCUAB's attorney told the district judge that this Notice of Dismissal had been filed January 16; that Petitioners' attorney had been notified January 16; that the dismissal mooted the case; it would no longer be before the court. The district judge had already received his copy of the

Notice of Dismissal, but the Certificate of Service therein shows Petitioners' attorney was served a copy of the Notice of Dismissal via first-class mail January 16.

The district judge made no ruling on the question of the dismissal and mootness during the hearing, although he did overrule an objection by NCUAB's attorney, on the grounds of the dismissal, to a question of Petitioners' attorney, and the judge then determined that the dismissal was not the result of an agreement as he had assumed, but was dismissed unilaterally. Neither did the district judge at the end of the hearing give any instructions about preparing an order for the dismissed case. As part of his ruling, he made the following concluding comments about the conservatorship:

> That's the court's judgment. And, Mrs. Rupp and Mr. Dycus, I'm going to ask you to prepare an order for the court to enter and the court will sign it. And we should do it soon. And if Mr. Boyd desires to perfect an appeal, it ought to be filed as quickly as possible.

However, NCUA's attorney, Mr. Dycus, did

prepare an order for the dismissed case which Petitioners' attorney declined to sign because of certain statements therein and which the district judge signed after the hearing January 31, 1990.

The Court of Appeals found the case to be dismissed unilaterally; that although petitioners did not consent to NCUA's dismissal, petitioners' counsel conceded in response to the district judges's questioning at the hearing that the effect of the dismissal was to render the action moot; that petitioners had requested the temporary cease and desist order be dismissed:

> Thus, when the NCUA dismissed the temporary cease and desist order prior to the hearing, the petition became moot because petitioners received the relief they requested.

Although further details and argument will be made later, the Court can follow the above statements better if the Court understands now that NCUA's attorney gave notice of the proposed dismissal to petitioners' attorney January 16 via telephone; that when the

Petitioners' attorney was questioned by the district judge the attorney had not received service of the notice of dismissal through the mail.

NCUAB's Response to Petitions to Show Cause. At 5 p.m., January 11, 1990, NCUAB's attorney filed in the District Court its joint response to the petitions to show cause; restated therein the allegations of the Order of Conservatorship; included a statement that conservatorship action had been taken by NCUAB in thirty-one previous cases although the scope of judicial review had been interpreted by U.S. district courts in only three cases, and in each case the standard of review was whether NCUA's actions were arbitrary and capricious; and that as to the Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order, its Response was that "NCUAB's Exercise of Its Statutory Authority to Issue a Temporary Cease and Desist Order was not Arbitrary and Capricious."

Notice of Filing of Portions of Adminis-

trative Record. At 5 p.m., January 11, 1990, at the same time of filing the preceding Response, NCUAB's attorney also filed in the District Court portions of the administrative record containing 194 unnumbered pages. This record contained a copy of the Order of Conservatorship; it did not contain a copy of the Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order; the facing page of the record however showed that it was being filed jointly in both cases.

During the hearing on the conservatorship, essentially the same record, consisting of 164 numbered pages, in which the title page and certain photocopied court opinions were deleted, was introduced into evidence as Exhibit 1 by NCUA.

Approval of Conservatorship by State. Part of the above administrative record and Joint Appendix was a letter of November 27, 1989 in which the commissioner of the state interposed no objections to the placement into conservatorship of the Credit Union by NCUA,

the authority being Title XII, Section 1217 of the Financial Institutions Reform, Recovery and Enforcement Act, signed into law August 9, 1989.

Four contracts had been entered into by the Board of Directors of the Credit Union with Mr. Bingham, said the commissioner; the contracts favored Mr. Bingham; he had refused to renegotiate the contracts. Because of the contracts, and the inability of management, the Credit Union was experiencing profitability problems. It was in a deficit position. The Commissioner further said:

> It is my understanding that upon the appointment of a conservator by NCUA, the conservator may seek to repudiate any contract with (sic) is deemed to be burdensome to the institution. It is further my understanding that NCUA's long-term goal is to merge the Credit Union into another credit union in the Memphis, Tennessee, area.

Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order. On December 15, 1989, representatives of NCUA served a Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order,

Docket No. 891202-III, on J. Gordon Bingham, Jr., the manager with his wife Brenda H. Bingham of the state-chartered First Central Credit Union of Memphis (Credit Union). This notice and order was served pursuant to 12 U.S.C. Sections 1786(e)(1) and (f)(1).

Sec. 1786(e)(1) provides that the NCUA Board (NCUAB) may serve upon a credit union a notice of charges if the credit union is about to engage in an unsafe or unsound practice or violate any written agreement entered into with NCUAB. The notice is to contain a statement of the violation or the unsafe or unsound practice and fix a time and place at which a hearing is to be held to determine the issuance of any order to cease and desist.

Sec. 1786(f)(1) provides that a temporary cease and desist order may issue pending the completion of the administrative proceedings and NCUAB's dismissal of the charges, the order being effective upon service on the credit union.

The notice and order notified Petitioners

of the hearing to be conducted in accordance with the Federal Credit Union Act, 12 U.S.C. Sec. 1751 et seq, and NCUA's Rules and Regulations, 12 C.F.R. Part 747.01 et seq. Ten references in fact are made in the nine-page Notice and Order to a "hearing," and two references to the "proceedings," at a time and place to be set, for which timely notice would be given. Petitioners were directed also to file an answer with NCUA within twenty days of the service of the Notice and Order. Petitioners' attorney was directed to file a Notice of Appearance with NCUAB. The record shows that an answer and Notice of Appearance were filed. Petitioners also could apply within ten days as provided in 12 U.S.C. 1786(f)(2) for an injunction setting aside or limiting the Order pending the completion of the administrative proceedings.

Petitioners did apply for review and the case was set for hearing January 5, 1990. NCUA obtained a continuance until January 17. January 16, the sixteenth, at 4:30 p.m., a

Notice of Filing of Notice of Dismissal of Temporary Cease and Desist Order and Notice of Charges and Hearing was filed in the clerk's office of the District Court, the Certificate of Service showing service on the Petitioners' attorney herein via first-class mail also on January 16, one day before the hearing. The authority given by the Regional Director for the dismissal was 12 U.S.C. Sections 1786-(e)(2) and (f)(1).

Sec. 1786(e)(2) says that a cease-and-desist order becomes effective thirty days after service of an order except a cease-and-desist order issued upon consent; however, NCUAB's pleading itself shows that the temporary cease-and-desist order was effective immediately upon service, and was not issued upon consent.

Sec. 1786(f)(1) provides for a hearing; it says that the order served upon the credit union is to remain effective pending the completion of the administrative proceedings, and until such time as the Administration

dismisses the charges (emphasis added).

Petitioners were ordered to immediately cease and desist from interfering with the conservatorship or aiding or abetting any unsafe or unsound activity of the Credit Union, or entering its premises without written permission. They were immediately ordered to continue to provide adequate space for the Credit Union, continue to provide data-processing, and provide any other requested information. The temporary order was necessary because Petitioners were about to engage in an unsafe or unsound practice and violate provisions of the Federal Credit Union Act, 12 U.S.C. Sections 1551 et seq.

Under Charges, NCUAB was concerned particularly about the safety and soundness of the data processing services if the Petitioners should discontinue this service. Since the building housing the Credit Union was owned by Gordon and Brenda Bingham they could attempt to deny access to the building, enter it without permission, as well as destroy

books and records.

Under Facts, the Credit Union's Board of Directors had been advised in June 1987 by NCUA's Regional Director not to enter into contracts with the Binghams without his express approval, including that of the state, since the Regional Director would consider that to be an unsafe and unsound act resulting in administrative action. Four contracts were entered into in December 1988 by the Board of Directors with the companies owned by the Binghams: for the management of the Credit Union; for marketing of insurance to the membership; for data-processing services; for the leasing of real and personal property.

These contracts contributed to high operating expenses, large operating losses and the erosion of equity. These contracts provided material benefit to Petitioners, the Binghams, at the expense of the Credit Union and its members, and the insurance fund was put in jeopardy. Since the Binghams had virtual control over every area of the

operation they would likely put their own interest ahead of the Credit Union by engaging in unsafe and unsound practices.

Failure of the Petitioners to comply with the provisions of the temporary or any final order of NCUAB could result in civil money penalties of up to One Millions Dollars ($1,000,000) a day.

Order of Conservatorship. At the same time NCUAB served the preceeding notice and order, which was effective immediately, it also appointed itself conservator, also effective immediately, under authority of 12 U.S.C. Sec. 1786(h)(1), the sole, single authority cited in the whole Order. It said that with approval of the state NCUAB could appoint itself conservator ex parte without notice and immediately take possession and control of an insured credit union to conserve assets or to protect the insurance fund or the members.

NCUAB determined that, because of the Credit Union's unsafe and unsound practices,

the Order of Conservatorship was necessary to conserve assets and to protect the insurance fund and the members. The Court should note well here, however, as will be argued later, that, according to 12 U.S.C. Sections 1786(e)(1) and (f)(1), unsafe and unsound practices are statutory grounds for a notice of charges, a hearing, and a temporary cease and desist order, and such unsafe and unsound practices were averred as shown above in the dismissed companion case.

The Credit Union was chartered by the State of Tennessee October 25, 1977. NCUA first became involved when an insurance review was conducted March 31, 1984. Since that time NCUA had been heavily involved in the on-site supervision. The most recent insurance review was completed April 14, 1989 and culminated in the issuance of a Letter of Understanding and Agreement of July 27, 1989. Several on-site follow-up supervision contacts since that time had been made to monitor the Credit Union's progress. The Credit Union

as of October 31, 1989 had problems of:

Excessive loan losses; profitability caused in part by the new contracts; capital erosion; unsafe and unsound contracts entered into without the express approval of the Regional Director and the state since the Regional Director considered that to be an unsafe and unsound act which would result in administrative action; and failure to comply with a Letter of Understanding and Agreement signed July 27, 1989.

In an Order of Nonpublication for protection of assets, the insurance fund and members, NCUAB ordered that the Order of Conservatorship not be disclosed or made public except as authorized by the Conservator.

Testimony

Ben Mauldin, with NCUA for twelve years in civil service, held a bachelor's degree in accounting, and was former Director of Special Action in Atlanta. On December 15, 1989, he served the Order of Conservatorship and the

Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order on J. Gordon Bingham, Jr. The case had been assigned to special action in February 1989 after the signing of the four contracts. As a result of the contracts, he participated in an insurance review; the contracts were discussed extensively. As a result, a Letter of Understanding and Agreement was signed by the parties in July 1989, in which NCUA agreed the Credit Union would have until May 31, 1990 and May 30, 1990 to comply with provisions as to capital and earnings respectively.

Originally, the Board of Directors of the Credit Union refused to sign the Agreement; but they had an option--they were told to either sign or NCUA would have to consider administrative action. In August 1989 a meeting was called to discuss the contracts. No loss and no run on the Credit Union had been experienced. He classified the Credit Union as a good credit union; it had problems in the last ten to twelve months. It had never had to

have assistance in making a declaration of dividends. This was the first action against the Credit Union. He had been involved in two conservatorships.

The management and insurance contracts were canceled verbally by NCUAB also December 15, 1989. He knew at that time that ten days were allowed to seek court review, but there was no indication whether Mr. Bingham or the other officials were going to file within ten days or not, but the contracts were terminated at the time of delivery of the orders. He had authority to cancel the contracts under the conservatorship, and that authority was based on discussions with general counsel and other attorneys in Washington, as well as present counsel, Mrs. Rupp.

James Richardson had been with NCUA for twenty-five years and was a principal examiner; he held a bachelor's degree in business administration with emphasis in accounting and was in civil service; he had been in Memphis thirteen years. He first

began performing insurance reviews of the Credit Union in April 1984, and had concerns at that time because technically the Credit Union was insolvent. Gordon Bingham, president of the Credit Union, testified that when the conservator for the Credit Union was appointed, it was solvent.

Mr. Richardson said a financial statement of the Credit Union reflected a net loss of $273,536.23 from January through October 31, 1989. But Mr. Bingham testified that a lot of the Credit Union's loss for the year was caused by NCUA's changing the rules. The state had reserve rules that the Credit Union went by for years, then under the Letter of Understanding and Agreement executed in July 1989 the Credit Union had to use another rule and charge off a lot more money than had been charged off in past years. The Board of Directors were refusing to sign the Agreement because it was incorrect in many places; compliance dates of May 31, 1990 and May 30, 1990, were not given the NCUAB when approval of the conservatorship

was sought and the Board had additional time to comply.

Mrs. Bingham, vice-president, did the accounting for the Credit Union. She said NCUA made them sign the Letter of Understanding and Agreement. Since 1981 the Credit Union had used state figures on delinquncy and the amount of money that had to be kept in reserve, but under the agreement the state procedure was no longer adequate, and NCUA wanted the Credit Union to use an arbitrary figure which their examiners would use in determining which loans were bad. NCUA determined which loans were delinquent and whether they were losses. The Credit Union was made to charge off one loan of $10,000, and the next day it was paid off. In October [1989] Mr. Richardson said to raise the allowance for loan losses by $161,000; there was some 70, 80,000 in it then, but the Credit Union had to raise that by $161,000. The difference had to be expensed in October, and then NCUA said the Credit Union had a

tremendous loss in October. The state did not have an allowance for loan losses; it is against state law. Mrs. Bingham had to make two reports every month, one for the state, the regulator of the Credit Union, that did not have an allowance for loan losses, and one for NCUA that did have an allowance for loan losses. According to Mrs. Bingham, NCUA was actually regulating the Credit Union.

Mr. Richardson told the Binghams that they could not accept deposits above $2,000--he did not tell them that--it was an agreement. The Binghams agreed to it. It was in the record as an agreement; any mandate would have to come from the regional office; he was doing it under his discretionary authority; he made the decision himself--along with the Board of Directors. This was 1985. According to the witness the Credit Union was advertising an 11 per cent rate on any account over $2,000. A lot of people were putting heavy chunks of money into the Credit Union; the amounts averaged something like $35,000; the Credit

Union was earning slightly less than 8 per cent on their investments and they were paying 11 per cent on these chunks of money. During closing argument Petitioners' attorney was informed by the Court that Mr. Bingham wanted to say something, which he related to his attorney, but the Court said no proof was in the record as to the Credit Union's average yield.

Mr. Richardson said the Credit Union was a life-line credit union, one serving a membership that would not have credit union service elsewhere, companies that did not have the number of people to have their own credit union; the Credit Union was life-line in that respect. Mr. Bingham testified that the Credit Union had about seven hundred participating companies--including the Better Business Bureau of Memphis. Mr. Richardson was not aware of any obligation of any member to have insurance marketed by the Binghams; it was not required because that was a condition of the state that any insurance premiums and so

forth not be required; as far as he knew nothing was required to be purchased. Mr. Bingham confirmed that no member had to take insurance; no complaint had been received from the state department of insurance or anybody; less than 20 per cent of their membership had insurance, even though some companies joined the Credit Union just to get the group dental and health insurance.

Mr. Bingham testified that he sold over $100,000,000 of life insurance prior to getting into the Credit Union, that he and his wife had been very successful in the insurance business and they found this to be way of sponsoring a credit union. He and his wife first became involved with the Credit Union as managers at the end of 1978. At first they had no contract and were just donating space, then they invested in a computer because one or two employees could not keep up with the bookkeeping. At the present time it had about seven hundred participating companies---including the Better Business Bureau of

Memphis.

Mr. Richardson testified that he had been offering suggestions for the improvement of the Credit Union since 1984 and he considered it in a lot better shape than it was in 1984; especially at the end of 1987 and 1988 it had grown financially stronger. The Binghams were managers of the Credit Union during his association with it; the assets and the memberships had grown. The NCUA had not approved the percentage-of-gross-income contract for the Binghams as managers, but the original contract of 29.5 per cent had been approved by the state. He accepted the 40 per cent contract, but the Binghams were never told that they had to rescind the 40 per cent contract. Robert Wilson, testifying for the Credit Union, however, said that the Binghams had worked as a management team under a percentage contract until December 1988 when the Board was instructed by NCUA to come up with other contracts for them to work under and which were put into effect January 1989.

According to Mr. Richardson the difficulty with the Credit Union started when the Binghams changed from the percentage contract to a definite-sum contract as managers with the Credit Union then having to absorb all the other operating expenses; that change occurred January 1 [1989].

Mr. Bingham testified that the first percentage contract was approved by the state and he also was approved to be on the Board. Mr. Richardson required them however to get proof that they would have money to subsidize the 40 per cent contract and continue to sponsor the Credit Union. Mr. Bingham obtained such proof in letter form from one of his insurance companies that guaranteed him $30,000 a month for six months, and Mr. Richardson therefore allowed them to continue to operate the Credit Union.

Mr. Mauldin testified that the Credit Union had problems in the last ten to twelve months; he classified it as a good credit union. Mr. Richardson testified that the

Credit Union had a high propensity for loan losses because of the people they served; a CPA firm several years before had determined that the Binghams had contribduted $614,000 in support of the Credit Union. Mr. Bingham confirmed by an exhibit that a CPA firm, Zoccola & Associates, reported by letter of November 24, 1986 that the Binghams had put $614,916 into the Credit Union.

In marketing the Credit Union, Mr. Richardson said that Mr. Bingham had worked for a long time toward merging a credit union with Malone & Hyde in Texas with the Credit Union. Mr. Richardson did not recommend that the Malone & Hyde Credit Union be given to another credit union; he recommended putting off the approval. Texas had approved the merger; Tennessee had approved the merger; NCUA did not approve the merger.

As for the lease contract, Mr. Bingham testified that Mr. Richardson would not let the Credit Union buy the building that housed the Credit Union so the Binghams bought it for

$175,000 for the use of the Credit Union which leased 60 per cent of it. The Credit Union had to have a place and this building was a former branch bank.

In providing data processing services under that contract, Mr. Bingham said that the Credit Union had gone through three different Unisys computers and he and his son had learned to use all of it. When NCUA took over, they crashed the computer--and could not get it back up; they could not get the printer to work, and Mr. Bingham showed them how to operate it at three o'clock in the morning. His son had been discharged originally by NCUA, then brought back to help them with the computer. Later, NCUAB had another computer in place at the Credit Union, although his Unisys computer was under a maintenance contract of $1,300 a month.

NCUAB stated in its temporary order that the failure to comply with its terms, or any final order issued by NCUAB pursuant to the proceedings, could result in civil money

penalties of up to $1,000,000 per day. In the Order of Conservatorship, an Order of Nonpublication provided that its contents must not be disclosed or otherwise made public except to the extent authorized by the conservator or his agents. Mr. Bingham testified that NCUAB was referring telephone calls about insurance to him, but he could not help because of the possible fine. He further related that John S. Ruffin, Regional Director of NCUA, Atlanta, said that he was going to move the Credit Union within ten days, and apparently had already made plans to move until his attorney objected to the move at the time NCUA's attorney sought a continuance of the hearing. As the source of his statement Mr. Bingham identified an article, which was admitted as an exhibit, that appeared in the Memphis Business Journal of January 1-5, 1990. The hearing was set for January 17, 1990.

Ginger Andrews testified she had served on the Board of the Credit Union for four or five years. She was employed by Federal

Express, in Memphis, as a CPA, in corporate accounting, and spent a year in the legal department, reviewing contracts. Presently she was a senior account research analyst and analyzed the revenues and receivables and did internal account studies. The Credit Union served blue collar workers, low income people; Federal Express served people with much higher income. She had been a part of the negotiations between the Board and the Binghams. Before the Board went into the matter of the contracts, the Board wanted an audit done to see exactly how much the Binghams had spent of their own money on the Credit Union. Zoccola & Associates, a reputable CPA firm, reported [November 24, 1986] that the Binghams had contributed $614,981 to the Credit Union.

Mr. Mauldin of NCUA testified that NCUA is "mandated by Congress to regulate, not regulate, but to supervise and direct the share insurance fund"; the main purpose was to protect the insurance fund, which was over a billion dollars. Mr. Richardson of NCUA was

very much interestsed in preserving the insurance fund; as to how much money was in that insurance fund, he had no idea. Mr. Bingham testified that according to annual reports he received, the insurance fund was closer to two billion dollars.

Robert Wilson did business as the United Auto Recovery, Memphis, and had been a member of the Board of the Credit Union since its inception in 1977. However, he was told by Mr. Richardson and NCUA's attorney from Washington, Mrs. Rupp, that he had a conflict of interest. He had a car repossession agency and did work for 90 per cent of the credit unions and had done so since 1973, and did the same for First Central Credit Union. He was told that it would be best if he resigned, which in did in May or June 1989. Mrs. Rupp quoted something from an NCUA or federal guideline or manual where it was said that if what he was doing could be conceived as a conflict of interest that he needed to either give up what he was doing or resign his

position from the Board of Directors.

Dr. James Collier served on the Board of the Credit Union probably since 1977 or 1978. He was chairman of the Board and familiar with the four contracts. Dr. Collier did not willingly sign the Letter of Understanding and Agreement. The state commmissioner indicated that this was in the nature of an order. The agreement was signed because they were ordered to do it. Mr. Bingham testified that Dr. Collier had taken all ten parts of the written national examinations to qualify as a Certified Credit Union Executive, the first person to be so certified in West Tennessee. Mr. Bingham had taken one, and Mrs. Bingham, two, of the tests. Dr. Collier said he held a bachelor's degree in chemistry, a master's degree in insurance, and a Ph.D in insurance and finance. He was retired from Memphis State University where he taught mostly finance and insurance. Gordon Bingham had a degree in finance from Memphis State University, he and his wife Brenda held the distinction

of Chartered Life Underwriter, and he was formerly the Director of Insurance for Memphis and Shelby County, Tennessee.

Mr. Bingham testified that Mrs. Andrews, a Board member, worked in the legal department of Federal Express and reviewed contracts and leases for them, which is what she was doing when the contracts herein were negotiated. NCUA strongly asked that the Board have legal counsel to draw the contracts, an expense the Credit Union could not afford; therefore the Binghams ended up paying over $10,000 in disputed attorneys' fees for the contracts. The management contract for him and his wife was for $48,000, for two people.

ARGUMENT

The questions involved in this petition are of national importance; they should be finally decided by this Court; they appear to be of first impression. The opinion of the Court of Appeals is not clear in that it omits relevant details as to all that happened, and if allowed to stand certain significant

questions of statutory interpretation, case law and constitutional application will be left unanswered to the detriment of the world of credit unions. The published opinion of the Court of Appeals therefore will have little value as a precedent except to allow NCUAB's agents to continue their transgressions.

Dismissal and Mootness

1. NCUAB's unilateral dismissal did not render this case moot. NCUAB made use of two contradictory pleadings and orders simultaneously, and the Court needs to understand this matter as a whole to see the duplicity, improper procedure and lack of due process. At the time of the district judge's questioning, Petitioners' attorney also informed the judge that "there is some cross-referencing in the two cases." NCUAB was relying upon the same allegations applicable by statute only to the dismissed case to prove the necessity for the conservatorship. The dismissal did not moot the issues of the four contracts and the

Letter of Understanding and Agreement because the same issues as to Unsafe and Unsound Contracts and the Failure to Comply with the Letter of Understanding and Agreement, the basis for these cases, were also pleaded and still at issue and very much alive in the companion conservatorship case. As said by the Court of Appeals in citing its own case, **International Union v. Dana Corp.**, 697 F.2d 718 (6th Cir. 1983, en banc), the litigation as a whole had not concluded.

At the beginning of the hearing January 17, 1990 in District Court NCUAB's attorney said that the day before with notice to Petitioners' attorney he had filed a notice of dismissal which mooted this case. The district judge said he had received his copy, which would have been hand delivered, by the time of the hearing; however, Petitioners' attorney argues by inference that the above notice of January 16 was via telephone, that he had not received his mailed copy of the notice by the time of the hearing and resultant

questioning--with time to prepare, to study all the statutory provisions--which the judge should have realized. Moreover, the customary way to dismiss under these conditions was by application of Rule 41 of the Rules of Civil Procedure which required the filing of a stipulation of dismissal. The judge however never made a ruling of any kind during the hearing.

Sometime after NCUAB's attorney made the above announcement as to dismissal and mootness, the district judge asked whether Petitioner's attorney confirmed the mootness, and still later erroneously assumed that the dismissal was the result of an agreement, then overruled NCUAB's objection to a question on the grounds of the dismissal. Although the Court of Appeals concluded that petitioners did not consent to NCUA's dismissal their counsel did concede in response to the district judge's questioning that the effect of the dismissal was to render the case moot, since Petitioners had received the relief they

requested; but no authority is cited for such holding. The dismissal however highlighted the abusive charges and irresponsible methods used by NCUAB, in Atlanta, against Petitioners, law abiding American citizens who invested over a million dollars in sponsoring the Credit Union, all of which was beneficial to the members and known by Mr. Richardson, in Memphis. Not one member of the Credit Union testified for NCUAB.

Moreover, this Court should note that NCUAB's own pleadings indicated that the scope of review for the hearing of the dismissed case to be the broad provisions of the Administrative Procedure Act, 5 U.S.C. Sec. 706, whereas the Court of Appeals affirmed inconsistently that the scope of review for the conservatorship was only whether NCUAB acted arbitrarily and capriciously, but independently of the Administrative Procedure Act. NCUAB's filing of both cases simultaneously, apparently their modus operandi, would have required the district judge to apply a different scope of

review for each case while hearing them simultaneously. How can such procedure be constitutional due process? As shown in **International** a cease and desist order should be used first; it then is followed by a conservatorship. What is the purpose in this case of filing both at the same time, except to take advantage of the Temporary Cease and Decease Order. From the record NCUAB never intended to hold a hearing in the case dismissed although as shown below a hearing is required by statute either before or after issuance of an order to cease and desist. Filing both at the same time is an abuse of legal process. Before this Court the whole matter apparently is one of first impression.

To support the dismissal the Court of Appeals cited **International** wherein the parties had executed a Settlement Agreement which mooted the case. This is the very point argued below by Petitioners in the Court of Appeals. The usual way of dismissing a case set for hearing after issues joined is for the

attorneys on either side to sign a consent order of dismissal for submittal to the court; and in fact such stipulation is required by Civil Rule 41. What Petitioners' attorney said in response to the district judge's questioning was not the proximate cause of the dismissal; it was the administrative, unilateral decision by NCUAB to dismiss and approved by the Court of Appeals. The district judge in this case never expressed an opinion during the hearing; the resultant order should have been based upon a ruling made in open court; and the order finally entered still was not based upon any findings under 5 U.S.C. Sec. 706 as set forth in NCUAB's own pleadings and as required by that statute, as shown next.

2. The scope of review applied in the District Court and approved by the Court of Appeals was not that applicable according to statutory guidelines. As said in NCUAB's consolidated notice and order the forthcoming hearing would be be conducted in accordance with the Federal Credit Union Act and Part 747

of NCUA's Rules and Regulations, 12 C.F.R. 747.01 et seq. Sec. 747.01 provides that judicial enforcement of an order, as well as judicial review thereof, shall be as prescribed in the credit union act and what is commonly called the Administrative Procedure Act, 5 U.S.C. Sec. 500 et seq. The scope of review of a reviewing court is set forth in 5 U.S.C. Sec. 706; as said in the heading:

> ... the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action....

The Court of Appeals failed to require such scope of review.

3. The Court of Appeals further erred by overlooking the statutory grounds upon which NCUAB's notice of dismissal was based. The statutes relied upon were 12 U.S. Sections 1786(e)(2) and (f)(1). Sec. 1786(e)(2) has nothing to do with this case. The cease-and desist order was effective immediately upon service rather than becoming effective at the expiration of thirty days; neither was the

order issued by consent as provided in 1786(e)(2); and very importantly any such order is issued based upon the provision of 1786 (e)(1) which, as shown in the next paragraph, provides for a hearing.

Sec. 1786(f)(1) involves the unusual procedure necessary in issuing a temporary cease and desist order prior to a hearing--although a hearing is still required after its issuance to determine if the order should be permanent. The difference is that Sec. 1786(e)(2), cited in the above paragraph, is based upon the procedure outlined in 1786-(e)(1), which provides for a hearing or an opportunity for a hearing before the issuance of a cease and desist order. Either way, a hearing must be held, before or after the issuance of the order. Such hearing has been denied Petitioners.

NCUAB also in unilaterally dismissing the charges misconstrued 12 U.S.C. Sec. 1786(f)(1) by using "and" disjunctively rather than conjunctively. This section toward its end may

be paraphrased as follows:

Such order shall remain effective and enforceable (1) pending the completion of the administrative proceedings pursuant to such notice--**and**--(2) until such time as the Administration shall dismiss the charges specified in such notice.

As said in Black's Law Dictionary "and" is used to conjoin clauses; it signifies that something is to follow; it means "along with." This section therefore as condensed in (1) and (2) above required a hearing before the dismissal. The statute does not provide that NCUAB may alternatively hold a hearing--**or**--dismiss the charges. Petitioners have been denied a hearing.

4. Therefore, and for all of which, the Court of Appeals erred in approving the withholding of a hearing, the withholding not being in accordance with law, and denied Petitioners their life, liberty and property contrary to the Fifth and Fourteenth Amendments to the Federal Constitution, and in

violation of the scope of review provided in 5 U.S.C. 706(1),(2)(A) and (2)(B).

Conservatorship

1. The Court of Appeals erred in sustaining the conservatorship because in effecting the appointment NCUAB arbitrarily and capriciously misappropriated statutory language applicable only to the imposition of a cease and desist order. The only section of the code cited in the Order of Conservatorship is 12 U.S.C. 1786(h)(1), the authority for the conservatorship herein under subparagraph (A) because of the allegations of necessity to conserve the Credit Union's assets, the insurance Fund and interests of the members. However, 1786(h)(1) including subparagraph (A) contain no expression of statutory powers. But in support of the Order of Conservatorship NCUAB arrogated unto itself the provisions of 1786(e)(1), without specifying the section, which is the authority for the imposition of a cease and desist order by NCUAB for engaging in an unsafe or unsound practice or the violation

of a written agreement entered into with NCUAB, as in the case dismissed.

For example, Section IV of the Order of Conservatorship was devoted to Unsafe and Unsound Contracts, which allegedly were unreasonable and profited Mr. Bingham to the detriment of the Credit Union, contributed to the losses experienced by the Credit Union, and were burdensome and materially threatened the insurance fund; and Section V was about the Failure to Comply with the comprehensive Letter of Understanding and Agreement, in which Petitioners had agreed to certain provisions which ostensibly would alleviate the above problems, although Petitioners were forced to sign the Agreement under threat of administrative action by Mr. Mauldin, NCUA's Director of Special Action in Atlanta.

This case therefore is really about the four contracts, including the comprehensive Agreement, all of which were very prominent in the pleadings of both cases herein. The prophesied statutory insolvency in twelve

months was questionable as a grounds for conservatorship because the Credit Union was insolvent in 1984 when no conservator was appointed. The authority for the conservatorship was found in Title 12, Sec. 1217 of the Financial Institutions Reform, Recovery and Enforcement (FIRRE) Act of August 9, 1989, according to the commissioner of the state in his letter of November 27, 1989, wherein he also said that the Board of Directors had entered into four contracts with Mr. Bingham which favored his interests and were a detriment to the Credit Union, that a conservator could seek to repudiate any contract deemed to be burdensome to the Credit Union, and his further understanding was that NCUA's long-term goal was to merge the Credit Union. Yet, no statutory authority to repudiate any contract deemed to be burdensome was specifically cited in the Order of Conservatorship served December 15, 1989.

The emphasis placed upon the contracts is shown also by the fact that in February 1989,

right after the four contracts were signed, the case was assigned to NCUAB's Ben Mauldin in Atlanta. Mr. Richardson in Memphis also was very much concerned about the contracts, since they were incurred by the Credit Union as of January 1, 1989. As a result of the contracts, an insurance review was conducted in May 1989, at which time the contracts were discussed extensively; as a result the comprehensive Agreement was issued. In August 1989 further negotiations took place about the contracts. Therefore, the chief theme and substance of these two cases is the four contracts and the Agreement which purported to be a formal joint recognition of the Credit Union's situation

In sustaining the conservatorship the Court of Appeals relied upon decisions affecting the former Federal Home Loan Bank Board (FHLBB): **Alliance Federal Savings and Loan v. FHLBB,** 782 F.2d 490, (5th Cir. 1986), and **Biscayne Fed. S. & L. v. FHLBB,** 720 F.2d 1499 (11th Cir. 1983), cert. den. 467 U.S. 1215

(1984). First, the Court of Appeals was unaware that because of a major overall of the banking industry in view of its many problems, FHLBB and the position of Chairman of FHLBB, were abolished by Sec. 401(a)(2) of the above FIRRE Act of August 9, 1989 (U.S. Code and Congressional News, Vol. 1, 101st Cong., 1st Sess. 1989, 103 Stat. 354).

The enabling statute in the above two cases was 12 U.S.C. 1464(d)(6)(A) which authorized FHLBB to appoint a conservator because of unsafe or unsound practices or unsafe or unsound conditions to transact business, whereas those unsafe or unsound practices or conditions are not grounds for a conservatorship under NCUAB; but under 12 U.S.C. 1786(e)(1) they are grounds only for the issuance of a cease and desist order, as in the case dismissed.

However, the Court of Appeals was unaware that such statutory grounds differed for FHLBB and NCUAB. Congress saw fit to make further distinctions between FHLBB and Credit Unions.

In 1464(d)(6)(A) thirty days were allowed to seek court review against FHLBB; ten days are allowed against NCUAB. Petitioners attorney could well have used the thirty days herein in view of the tenth day's being Christmas Day, followed by New Year's, when law libraries were closed during much of the holiday season or on short hours and no time existed to file motions or take discovery; when the members of the Board of Directors were out of town or difficult to find, and by inference in view of their cross-examinations, they only appeared at time of trial to testify for Petitioners--and all of them did testify for Petitioners. Also, a stay was provided against FHLBB; none against NCUAB.

Moreover, in **Biscayne**, the parties had stipulated to statutory insolvency. A stipulation means an order voluntarily signed by all parties, whereas in the case at bar Petitioners were forced to sign the Agreement under threat of administrative action. The Agreement was hardly that since it was

coerced. In **Biscayne** outrageous conduct by FHLBB's staff following their appointment had not contributed to the insolvency, whereas in this case the regulation of this state-chartered Credit Union by NCUAB contributed to the conservatorship, such as for example NCUAB's changing of state rules to require an allowance for loan losses when the state law did not provide for an such allowance, and the Credit Union's resultant technical loss as of October 31, 1989. This amounts to federal preemption of state regulation, and, except for the appointment of a conservator, no provision exists in the federal and state credit union acts for delegation of authority.

Finally, NCUAB's real purpose in these two cases was to eliminate the Credit Union's management and its outstanding and independent Board of Directors because of the four contracts, and not some technical insolvency inasmuch as the Credit Union was insolvent in 1984, a basis of estoppel. The District Court

assumed that NCUAB possessed powers to exercise as conservator which assumption was approved by the Court of Appeals. However, for the first time as its power to cancel contracts, NCUAB cited 12 U.S.C. 1787(c)(1)-(A)(B)(C) in its brief before the Court of Appeals, even though this section was a part of the FIRRE Act and also effective August 9, 1989. The District should have been made aware of this information. Petitioners should have been informed originally of all relevant statutes in NCUAB's pleadings in making their decision to seek court review; this information for the first time in the Court of Appeals comes too late. Constitutional due process requires notice and an opportunity to prepare.

Furthermore, NCUAB's imposition of the Order of Conservatorship at the same time as the Consolidated Notice of Charges and Hearing--Temporary Cease and Desist Order is contradictory. Under the all-inclusive theory of the Court of Appeals as to the conservatorship, that is all that would be

necessary. NCUAB however arrogated unto itself the cease and desist provisions, which is also outside the record of meaning of the statute, without providing the hearing. Petitioners appealed both cases to show the modus operandi and the lack of a fair hearing in the whole matter. NCUAB has national jurisdiction and the questions raised herein are important and of a recurring nature.

WHEREFORE, Petitioners earnestly pray that this petition be granted.

Respectfully submitted,

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Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition for Writ of Certiorari have been served upon Mrs. Mary Rupp, Staff Attorney, National Credit Union Administration, 1776 G Street, N.W. Washington, D.C. 20456, that three copies also have been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, all via U.S. Mail, first-class postage prepaid, this 4th day of June 1991.

Albert H. Boyd

Albert H. Boyd

Attorney for Petitioners